BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOVITO ESCALANTE	)	
Claimant	)	
	)	
VS.	)	
	)	
CREEKSTONE FARMS PREMIUM BEEF	)	
Respondent	)	Docket Nos. 1,019,213 &
	)	1,021,888
	)	
AND	)	
	)	
COMMERCE & INDUSTRY INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the April 8, 2008 Order entered by Administrative Law Judge John D. Clark (ALJ) awarding $46.16 in penalties for respondent's failure to pay medical mileage. The Board heard oral argument on August 5, 2008.

ISSUES

In an earlier preliminary hearing the ALJ ordered respondent to pay "medical mileage" although there was no specific itemization or amount contained within the Order. When the mileage was not paid, claimant served a statutory demand and thereafter set the matter for a hearing. Following the hearing, the ALJ concluded that medical mileage is a medical bill pursuant to K.S.A. 44-512(a) and assessed penalties against respondent in the amount of $46.16 which represented 10 percent of the total value of the mileage set forth in the statutory demand.

The respondent requests review of whether a penalty can be imposed pursuant to K.S.A. 44-512(a) for medical mileage reimbursement when the Order does not designate a certain sum. Respondent also takes issue with the ALJ's Order as the penalty figure is based upon mileage that was incurred *after* the hearing and in connection with an independent medical examination. Respondent also questions whether it can be made

responsible for the mileage associated with a court-ordered independent medical examination that results in a functional impairment rating issued pursuant to K.S.A. 44-510e(a).

Claimant argues that the order should be affirmed. Claimant argues that while the Order contained no specific amount to be paid, the medical records and claimant's testimony provided enough specificity from which the lawyers could glean the appropriate mileage to be paid. And the fact that the mileage to the independent medical examination was incurred after the hearing and the entry of the Order is irrelevant as the Order provided for the payment of medical mileage, regardless of the date incurred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

This is an appeal from an Order entering penalties against respondent for its failure to pay medical mileage. The underlying facts are well known to the parties and will only be summarily repeated. Suffice it to say that an Order was issued in this claim on August 14, 2007. That Order authorized an independent medical examination by Dr. George Fluter and "Medical Mileage is ordered paid."[1] During that hearing the ALJ suggested to the parties that they meet and determine, based upon Mapquest, the mileage involved in the 7 trips claimant took to the authorized treating physician.

Nearly 7 months passed and nothing occurred in this claim other than claimant's trip to Dr. Fluter, for a rating examination. There was no meaningful communication between the two lawyers on the issue of mileage until February 4, 2008, when a detailed demand was served upon respondent. The mileage demand reflected an increase in the round trip miles for each office visit to the authorized treater. Instead of claiming 120 miles, claimant was demanding 133 miles round trip. Respondent then attempted to use the Mapquest service to determine the accuracy of claimant's demand for mileage using the claimant's address referenced in the hearing transcript and concluded the mileage was 128 miles round trip.

Eventually, but not within 20 days of the demand, respondent paid claimant mileage based upon 7 trips to the treating physician, 128 miles round trip and payment of the mileage to Dr. Fluter, the independent medical examiner. But because the payment was not made within 20 days, claimant proceeded with his request for penalties.

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[1] ALJ Order (Aug. 14, 2007).

K.S.A. 44-512a(a) provides:

> In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than $100 per week for each week any disability compensation is past due and in an amount **for each past due medical bill** equal to the larger of either the sum of $25 or the sum equal to 10% of **the amount which is past due on the medical bill,** if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand. (Emphasis added)

The ALJ concluded that mileage incurred in connection with medical mileage is equivalent to a medical bill and therefore constitutes "medical compensation". Thus, based upon claimant's itemized demand for $461.65 in medical mileage, which respondent appears to concede was not paid within 20 days of the demand,[2] a 10 percent penalty was imposed. This appeal followed.

At oral argument, it became clear that counsels' willingness to communicate is wholly absent. And although the Board is hesitant to reaffirm either party's positions or conduct in this matter, the Board nevertheless finds the ALJ's Order for penalties must be set aside as the penalty assessed is based upon an Order that lacked sufficient specificity.

K.S.A. 44-525 provides that "[e]very finding or award of compensation shall be in writing signed and acknowledged by the administrative law judge **and shall specify the amount due and unpaid by the employer to the employee** up to the date of the award, if any . . .". At the August 2007 hearing, claimant was primarily seeking medical treatment, but was also asking for reimbursement of his medical mileage. While he recited his address (which we now know was apparently incorrect), the resulting Order only directed respondent to pay the mileage. Unfortunately, there was no precise sum for the respondent to pay. Had there been some sort of itemized exhibit then this defect might have been overcome. But the simple fact is that the statute requires specificity in the sum to be paid. And based on this Order, respondent would be left to speculate on the mileage to be paid.

Claimant seems to mock respondent's arguments by suggesting that all respondent's counsel would have had to do is consult the medical records in order to

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[2] All but $15.27 of claimant's demand has been paid, albeit after the expiration of 20 days.

determine the amount of mileage to be paid. While that could be done, under these facts it would seem that that effort should have been made by claimant in preparation for the August 2007 hearing, thus avoiding this entire dispute. Moreover, it appears claimant provided an incorrect address or possibly, the court reporter transcribed the wrong address. That inaccuracy played itself out when respondent, in response to the demand in February 2008, attempted to calculate the mileage to be paid. Respondent even went so far as to calculate the mileage, ultimately paying more (per round trip) than claimant originally indicated at the August 2007 hearing.

Although the dispute is certainly magnified due in no small part to the parties' unwillingness to communicate and the delay in attempting to resolve this issue, the lack of specificity of the August 2007 Order and the resulting problems illustrate the importance of specificity within Orders. The Board finds that the lack of specificity within the August 2007 Order is fatal to the ultimate issuance of $46.16 in penalties. Therefore, the April 8, 2008 assessing penalties is set aside.

Respondent argues that mileage incurred in connection with independent medical examinations should not be reimbursable. However, the Board finds that such mileage is indeed "medical compensation". The fact that the mileage is associated with an independent medical examination does not take that expense outside the Act. The examination is authorized by the ALJ and the costs associated with traveling to that appointment is respondent's responsibility.

For the benefit of counsel, the Board expresses its distaste for this caustic dispute among officers of the court over issues that have a total economic impact of only $46.16. Reviewing the record, it is clear that the time and effort expended on this acrimonious dispute between counsel by the ALJ, the Board, and the attorneys, have eclipsed this economic impact by untold multiples. Counsel are reminded that the focus of workers compensation proceedings should be the speedy and efficient administration of claims of injured workers.[3] Counsel are also reminded that a lawyer is expected to maintain a professional, courteous, and civil attitude toward all persons (including opposing counsel) involved in the legal system.[4]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated April 8, 2008, is set aside.

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[3] See *Tull v. Atchison Leather Products, Inc.,* 37 Kan. App.2d 87, 150 P.3d 316 (2007).

[4] Preamble, KRCP Rule 226 (2007 Kan. Ct. R. Annot. 375).

IT IS SO ORDERED.

Dated this _____ day of August 2008.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

DISSENT

On June 11, 2007, claimant's counsel sent a demand to respondent's counsel which included a request for "Payment of Transportation cost to and from the authorized medical treatment". A copy of that demand letter was included with claimant's application for preliminary hearing filed June 22, 2007. At the August 14, 2007 preliminary hearing, claimant testified that he made 7 trips to Dr. Do, the authorized treating physician, at 120 miles round trip for each office visit. There was no contrary evidence. At the conclusion of claimant's testimony and again at the conclusion of the hearing the ALJ stated that the medical mileage is ordered paid for all of those trips. In his August 14, 2007 Order, the ALJ repeated that "Medical milage is ordered paid".

Respondent cannot seriously argue that it did not know the amount of medical mileage it owed. Respondent was ordered to pay claimant for 7 trips to Dr. Do's office at 120 miles per trip unless a different amount was agreed to. If respondent disputed claimant's testimony concerning the amount of miles between claimant's residence and Dr. Do's office then it should have said so at the hearing and presented evidence. Instead, respondent said nothing. The ALJ's Order for the payment of mileage was clear. If respondent found a different mileage using Mapquest then respondent should have reached an agreement with claimant's counsel or else pay the amount testified to by the claimant and sought a hearing before the ALJ to amend his August 14, 2007 Order. Respondent did neither until April 1, 2008 when it paid an amount that was based on more than 120 miles per trip. With respect to the mileage for the trip to the IME with Dr. Fluter,

this Board member agrees that the ALJ's Order is not clear. Therefore, penalties should not be assessed for respondent's failure to pay that amount. Respondent should be assessed penalties in the amount of $175 which is $25 for each of the 7 round trips to Dr. Do's office.

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BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge